

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JANICE OLSEN,)	IC 2001-012187
Claimant,)	IC 2001-011688
v.)	
)	
VENCOR, INC., dba EMMETT)	FINDINGS OF FACT,
REHABILITATION AND HEALTHCARE,)	CONCLUSIONS OF LAW,
)	AND RECOMMENDATION
Employer,)	
and)	
)	FILED JUNE 18 2007
AMERICAN HOME ASSURANCE COMPANY,)	
)	
Surety,)	
and)	
)	
STATE OF IDAHO, INDUSTRIAL)	
SPECIAL INDEMNITY FUND,)	
)	
Defendants.)	
)	

INTRODUCTION

The Idaho Industrial Commission assigned this matter to Referee Douglas A. Donohue. He conducted a hearing in Boise on September 29, 2006. Darin G. Monroe represented Claimant. Eric S. Bailey represented Employer and Surety. Kenneth L. Mallea represented State of Idaho, Industrial Special Indemnity Fund ("ISIF"). The parties presented oral and documentary evidence. They took post-hearing depositions and submitted briefs. The case came under advisement on March 20, 2007. It is now ready for decision.

ISSUES

After due notice to the parties, the issues to be resolved are as follows:

1. Whether Claimant suffered injuries caused by accidents arising out of and in the course of employment;
2. Whether the conditions for which Claimant seeks benefits was caused by the industrial accident; and
3. Whether apportionment under Idaho Code § 72-406 is appropriate;

4. Whether Claimant's condition is due in whole or in part to a subsequent intervening cause;
5. Whether and to what extent Claimant is entitled to benefits for:
 - a. Temporary total or partial disability ("TTD");
 - b. Permanent partial impairment ("PPI");
 - c. Permanent disability in excess of impairment;
 - d. Medical care; and
 - e. Attorney fees;
6. Whether Claimant is entitled to permanent total disability under the odd-lot doctrine;
7. Whether ISIF is liable under Idaho Code § 72-332; and
8. Whether and to what extent Carey formula apportionment is appropriate.

CONTENTIONS OF THE PARTIES

Claimant contends she suffered a compensable accident at work which injured her neck and cervical spine about Easter 2001, specifically between April 11 and 19, 2001. She suffered a second accident at work which injured her low back and lumbar spine on May 7, 2001. She is entitled to benefits. Employer and Surety unreasonably denied her claim.

Employer and Surety contend Claimant did not suffer a compensable accident on either occasion. Alternatively, if she did, the accidents did not cause the conditions for which Claimant seeks benefits. Alternatively, if these accidents are causally related, Claimant's entitlement to benefits should be apportioned to preexisting conditions under Idaho Code § 72-406. Claimant is not totally and permanently disabled. Employer and Surety reasonably denied the claim.

ISIF contends that Claimant is not totally and permanently disabled. Alternatively, if she is, she does not meet the statutory requirements for ISIF liability.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Hearing testimony of Claimant and vocational rehabilitation expert Barbara Nelson;

2. Joint Exhibits 1 – 37; and
3. Post-hearing depositions of vocational rehabilitation expert Douglas N. Crum, orthopedic spine surgeon Joseph M. Verska, M.D., psychiatrist James H. Bates, M.D., and Employer's medical director William H. Vetter, M.D.

All objections made during posthearing depositions are overruled. After considering the record and briefs of the parties, the Referee submits the following findings of fact, conclusions of law, and recommendation for review by the Commission.

FINDINGS OF FACT

1. Claimant worked as a nurse's assistant for Employer at its nursing home. She began in August or September 2000.

2. Claimant described lifting a patient as follows: Claimant lifted the patient from her bed to seat her in her wheelchair. Claimant had her arms around the patient's waist and the patient had her arms around Claimant's neck. As Claimant lowered the patient into a wheelchair, it rolled backward. Claimant released the patient to grab the wheelchair. The patient held on around Claimant's neck. Claimant was able to seat the patient in the wheelchair. Shortly after leaving the patient's room, Claimant felt immediate and sudden neck, chest, and right arm pain. This event occurred around Easter 2001, perhaps April 11, probably between April 11 and 19, 2001. Claimant did not report the event immediately because she thought it was an anxiety attack or a "heart attack."

3. Claimant described a second lifting accident as follows: On May 7, 2001, Claimant was attempting to lift a patient from a bed. The patient grabbed a handrail. Both Claimant and the patient fell onto the bed. Claimant felt immediate back and left leg pain. She reported this event to her supervisor.

Prior Medical Treatment

4. Claimant has a longstanding history of multiple medical complaints, including

a psychological disorder. She was diagnosed in childhood with Osgood-Schlatter Disease, which affects her knees. She described herself as “a little bit of a hypochondriac” and has frequently visited physicians.

5. On April 28, 1997, she reported bilateral knee pain arising from her longstanding Osgood-Schlatter Disease.

6. She reported right arm numbness as early as 1997. She reported she was experiencing dizziness. In January 1998, she also indicated she suffered from right arm paralysis. A cranial MRI was negative. The complaints of right arm symptoms have been frequent since.

7. She reported low back pain as early as March 28, 2000, and neck pain as early as April 7, 2000.

8. In January 2001, Claimant visited Ned Farber, D.O. She reported left elbow pain. An X-ray taken January 22 showed no abnormality. Left shoulder and chest X-rays were similarly normal. On January 25, she reported left hip pain.

9. In February and March 2001, she reported symptoms which were diagnosed as bilateral carpal tunnel syndrome.

10. Also in March 2001, diagnostic imaging revealed lumbar disc disease. On March 9, X-rays to her left hip and leg showed some degenerative disc disease in her lumbar spine with possible spondylolisthesis. A lumbar X-ray on March 20 confirmed grade 2 spondylolisthesis at L5-S1 and “marked degenerative disc disease.”

11. On April 2, 2001, Dr. Farber noted her complaint of chronic low back pain and commented on the prior X-rays.

12. On April 10, 2001, Joseph Verska, M.D., examined Claimant for back

and especially leg pain. He noted, “She has had progressive discomfort for many years. She cannot recall any specific injury.” On Dr. Verska’s new patient intake forms Claimant wrote that she had pain for years with gradual onset and no known cause. Based upon the X-rays, he tentatively recommended a decompression and fusion at L5-S1, but ordered an MRI first. The lumbar MRI showed the spondylolisthesis of L5 on S1 with facet joint osteophytes and other evidence of degenerative disc disease. The X-ray showed no finding indicative of recent trauma. He reaffirmed his recommendation of surgery at Claimant’s April 20 visit. On May 4, he considered low back surgery “most likely.” On May 11 he gave Claimant a modified work release and stated she “needs surgery.”

13. On May 7, 2001, Dr. Farber examined Claimant for her complaints of neck, low back, and bilateral leg pain. She did not report any accident or other precipitating event.

14. Claimant filed First Notice of Injury reports for both events on May 7, 2001.

Medical Treatment Following the Events (Cervical spine treatment after April 11)

15. On May 1, 2001, a cervical MRI showed osteophytes and other signs of degenerative disc disease. A C5-6 disc protrusion was seen. Dr. Verska opined this resulted from preexisting degeneration and not from recent trauma.

16. On May 8, 2001, William Vetter, M.D., examined Claimant. Nurse’s notes indicate “previous injury to back not documented for W/C approx 1-2 mo ago neck pain since”. Dr. Vetter’s notes for this visit focus on the May 7 accident and Claimant’s low back.

17. On May 29, 2001, Christian Zimmerman, M.D., examined Claimant at St. Alphonsus. She described the wheelchair rolling event and referred to the May 7 accident. The cervical spine fusion was scheduled. Dr. Zimmerman performed surgery on June 21. He performed a C5-6 fusion. His final diagnosis was “intervertebral disc, excision degenerating

disc material” [sic].

18. On August 16, 2001, cervical spine X-rays showed the surgical fusion and degenerative disease. Claimant continued to complain of neck pain and right arm numbness and tingling.

19. A May 6, 2002 CT scan of Claimant’s cervical spine showed no change.

(Lumbar spine treatment after May 7)

20. On May 8, 2001, Claimant visited William Vetter, M.D. She described the accident in which she fell on the bed while lifting a patient. She asserted left arm numbness began after this accident. Dr. Vetter noted, “She thinks that her chronic back pain that she has been having for the last 3 months is work related because it always seems to hurt after work.” He concluded, “I suspect no more than 5-10% of her back pain is associated with yesterday’s actions.”

21. On May 18, 2001, Dr. Farber again examined Claimant for her complaints.

22. On May 21, 2001, Claimant visited Tracy R. Johnson, M.D. Dr. Johnson diagnosed, “History of low back pain with spondylolisthesis L5 on S1, not work related. . . . Lumbar myofascial pain with right SI joint dysfunction, work related. . . . History of numbness and tingling in the right hand with disc herniation at C5-6, not work related.” On June 12, 2001, Dr. Johnson opined Claimant was medically stable as of that date without permanent impairment or restrictions related to the May 7, 2001 accident.

23. On May 31, 2001, another lumbar MRI showed spondylolisthesis with evidence of motion when performing extension maneuvers.

24. On August 16, 2001, Dr. Zimmerman noted her cervical spine was healing from surgery and he discussed Claimant’s lumbar spine. He noted she would eventually need low back surgery. On subsequent visits, Claimant reported increasing pain and weakness

associated with her low back and legs.

25. On September 21, 2001, another lumbar MRI showed the degenerative disease. Claimant continued to report bilateral leg pain, worse on the right, with intermittent numbness and tingling. Lumbar X-rays taken October 3 were consistent. Dr. Zimmerman scheduled low back surgery.

26. Claimant was admitted to St. Alphonsus October 12 through 16, 2001, for surgery. Dr. Zimmerman operated. He performed fusion at L4-5-S1. Claimant's postoperative course was not entirely felicitous. She had some postoperative drainage which required attention. She continued to report symptoms. Eventually, diagnostic imaging showed some malalignment.

27. Claimant was admitted postsurgically to Idaho Elks Rehabilitation Hospital where she stayed from October 16 through 25, 2001. Kevin R. Krafft, M.D. attended.

28. ICRD began assisting Claimant on November 29, 2001. ICRD closed its file on June 13, 2002, because Claimant disagreed with Dr. Zimmerman about whether she could return to work. ICRD reopened its file on August 25, 2004, and closed it again on August 4, 2005, when Claimant again disagreed with her doctor, this time Dr. Greenwald, about whether she could return to work.

29. On December 18, 2001, Claimant reported to Dr. Zimmerman that she fell on some ice. She was "ok" but wanted to be sure it was documented.

30. On February 12, 2002, Dr. Zimmerman corresponded with Claimant's prior attorney. The doctor was careful in responding to questions about causation. He stated, "According to Ms. Olsen, it is apparent to these caregivers that the patient did receive substantial enough injury for such that she did prompt medical evaluation. The causation for

this as reported by the patient was her industrial injury which occurred while she was working in Emmett.”

31. By August 14, 2002, Dr. Zimmerman was considering sending Claimant to a pain clinic or to Timothy Floyd, M.D. for a second opinion. Dr. Zimmerman was attempting to discontinue Claimant’s use of narcotics and muscle relaxants. By October 3, 2002, Dr. Zimmerman’s notes show Claimant was angry over the discontinuance of her prescriptions. She declined to see Dr. Zimmerman further and opted to visit Dr. Floyd.

32. On August 22, 2002, Claimant first visited Dr. Floyd. By October 10, 2002, she reported to Dr. Floyd that Dr. Zimmerman was pressing her for an immediate repeat surgery to her low back. Dr. Floyd noted the fusion did not appear to have worked, but advised caution for what he considered was not an urgent problem.

33. Hardware failure required a second back surgery. Howard King, M.D., operated on May 29, 2003 using both anterior and posterior approaches.

34. On July 19, 2006, James H. Bates, M.D., evaluated Claimant at her attorney’s request. He opined Claimant’s neck, right arm, and low back symptoms were related to the April and May 2001 industrial accidents, but not Claimant’s cervical disc herniation. For her neck injury, he opined a 26% PPI, apportioning 40% of it to preexisting causes. For her lumbar injury, he opined a 14% PPI, apportioning it 50/50 to preexisting causes.

(Other treatment)

35. On June 1, 2001, Claimant began visiting psychiatrist F. LaMarr Heyrend, M.D. for depression and anxiety problems. On January 2004, Dr. Heyrend reports he had seen her after she “had been in an accident in 1991 where she severely injured her back.” There is no support of record for this statement. Dr. Heyrend may well have meant 2001 instead of 1991.

36. Claimant began seeing psychiatrist Stephen T. Bushi, M.D., on November 11,

2001. He diagnosed bipolar disorder. By September 2002, Dr. Bushi had changed the diagnosis to schizoaffective disorder.

37. Claimant underwent bilateral carpal tunnel release surgeries on April 11, 2005.

Employment and Non-Medical Factors

38. At the time of the events at issue, Claimant was 42 years old. She is a high school graduate with some college. She received a certificate to work as a phlebotomist. She studied nursing but did not complete the prerequisites to become a nurse. She has studied interior design and is one class short of a two-year degree.

39. Claimant's work history shows a pattern of frequent job changes. She has worked in various jobs including, certified nurse's assistant, phlebotomist, interior designer, housekeeper, cook, cashier, apprentice carpenter, and a secretary. For portions of Claimant's adult life she did not work outside the home.

DISCUSSION AND FURTHER FINDINGS OF FACT

40. It is well settled in Idaho that the Workers' Compensation Law is to be liberally construed in favor of the claimant in order to effect the object of the law and to promote justice. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 910 P.2d 759 (1966). Although the worker's compensation law is to be liberally construed in favor of a claimant, conflicting evidence need not be. Aldrich v. Lamb-Weston, Inc., 122 Idaho 316, 834 P.2d 878 (1992).

41. **Accident.** "'Accident' means an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury." Idaho Code § 72-102(18)(b).

42. Here, Claimant testified about an event, the wheelchair rolling, which would constitute an accident. Her temporal assertions of “around Easter” or “between April 11 and 19” might well have been sufficient to reasonably locate the time of the accident as required by statute if this history were otherwise credible. Instead, all contemporaneous medical records demonstrate she both failed to report an accident and denied that an accident had occurred within those timeframes. Claimant’s belated recollection of the time period is the result of a (presumably unintentional) mnemonic confabulation which is not credible. Without supporting evidence, Claimant failed to show it likely that the wheelchair event occurred around Easter 2001 or whether she was recalling an event that occurred at some other time she worked for Employer. Thus, she failed to show it likely she suffered an accident around Easter 2001.

43. By contrast, Claimant described the event, in which she fell on the bed while lifting a patient, with a specific date. Thus, Claimant showed it likely she suffered an accident on May 7, 2001.

44. **Causation.** A claimant must prove she was injured as the result of an accident arising out of and in the course of employment. Seamans v. Maaco Auto Painting, 128 Idaho 747, 918 P.2d 1192 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. Beardsley v. Idaho Forest Industries, 127 Idaho 404, 901 P.2d 511 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 890 P.2d 732 (1995). A preexisting condition does not disqualify a workers’ compensation claim if the employment aggravated, accelerated, or combined with the preexisting condition to produce the disability for which compensation is sought. An employer takes the employee as it finds her. Wynn v. J.R. Simplot Co., 105 Idaho 102, 666 P.2d 629 (1983).

45. **(Cervical spine.)** The medical records show Claimant had a degenerative cervical condition. No contemporaneous treating physician could relate any injury, aggravation, or acceleration of the degenerative cervical condition to any work-related event, including the belatedly-described wheelchair event.

46. **(Lumbar spine.)** Claimant was undergoing continuing medical care for a degenerative lumbar condition immediately before, on the date of the accident, and after it. The recommendation for surgery had previously been made. Claimant was in a period of considering whether she would consent to surgery when the May 7, 2001, accident occurred.

47. The treating physicians unanimously rejected the existence of a likely relationship between the accident and her degenerative low back condition. Dr. Johnson was more generous; she found a temporary exacerbation which lasted from May 7 to June 12, 2001, which resulted in no permanent impairment. Treating physicians found no aggravation or exacerbation of symptoms, no objective changes in her spine upon diagnostic imaging, and no basis to opine the alleged accident caused or contributed to her low back condition. Medical records well support these opinions. Only Dr. Bates, who first saw Claimant on July 15, 2005, opined in Claimant's favor. The weight of medical evidence and opinion supports a finding that Claimant's degenerative low back condition was not caused, aggravated, or accelerated by the May 7, 2001 accident. She should be entitled to medical care from May 7 to June 12, 2001, for the low back muscle strain which Dr. Johnson opined was related to that accident.

48. Claimant failed to show she suffered any permanent impairment as a result of the alleged accidents.

49. All other issues are moot.

CONCLUSIONS OF LAW

1. Claimant failed to show she suffered a neck or cervical spine injury in an accident around Easter 2001;
2. Claimant suffered a myofascial strain to her low back as a result of the May 7, 2001 accident which resulted in no permanent impairment and is entitled to medical care benefits from May 7 to June 12, 2001;
3. She failed to show the May 7, 2001 accident aggravated or accelerated her preexisting degenerative lumbar condition;
4. All other issues are moot.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing Findings of Fact and Conclusions of Law as its own and issue an appropriate final order.

DATED this 4TH day of June, 2007.

INDUSTRIAL COMMISSION

/S/ _____
Douglas A. Donohue, Referee

ATTEST:

/S/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 18TH day of JUNE , 2007, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

Darin G. Monroe
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Eric S. Bailey
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Kenneth L. Mallea
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db

/S/ _____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JANICE OLSEN,)	IC 2001-012187
Claimant,)	IC 2001-011688
v.)	
)	
VENCOR, INC., dba EMMETT)	
REHABILITATION AND HEALTHCARE,)	ORDER
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Employer,)	
and)	FILED JUNE 18 2007
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AMERICAN HOME ASSURANCE COMPANY,)	
)	
Surety,)	
and)	
)	
STATE OF IDAHO, INDUSTRIAL)	
SPECIAL INDEMNITY FUND,)	
)	
Defendants.)	
_____)	

Pursuant to Idaho Code § 72-717, Referee Douglas A. Donohue submitted the record in the above-entitled matter, together with his proposed findings of fact and conclusions of law to the members of the Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant failed to show she suffered a neck or cervical spine injury in an accident around Easter 2001.
2. Claimant suffered a myofascial strain to her low back as a result of the May 7, 2001 accident which resulted in no permanent impairment and is entitled to medical care benefits from May 7 to June 12, 2001.

3. She failed to show the May 7, 2001 accident aggravated or accelerated her preexisting degenerative lumbar condition.

4. All other issues are moot.

5. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this 18TH day of JUNE , 2007.

INDUSTRIAL COMMISSION

/S/_____
James F. Kile, Chairman

/S/_____
R. D. Maynard, Commissioner

/S/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

/S/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on 18TH day of JUNE , 2007, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

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/S/_____